(2) Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2004

John Hudson, Petitioner,

v.

American Arbitration Association, Inc., Borg-Warner Protective Services Corporation and Burns International Security Services, Respondents.

On Petition for Rehearing En Banc to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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October 2004

QUESTION PRESENTED

Whether or not the arbitrator engaged in nonjudicial actions.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2004

JOHN HUDSON, Petitioner,
v.
AMERICAN ARBITRATION ASSOCIATION, INC;
BORG-WARNER PROTECTIVE SERVICES CORPORATION and
BURNS INTERNATIONAL SECURITY SERVICES, Respondents.

PETITION FOR REHEARING EN BANC TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

John Hudson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App., infra,1a-2a) are reported, respectively, in 502 U.S. 9, (1991) and 149 F.3d (1998). The opinion of the district court (App., infra,6a-13a) is reported at 340 F.3d (2003).

JURISDICTION

The court of appeals denied the petition for rehearing en banc and entered its denial on July 19, 2004 (App., infra,3a-4a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1651 (a).

STATUTORY PROVISION INVOLVED

Rule 60(b)(3) of the Federal Rules of Civil Procedure, provides, in relevant part, "this rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment or to set aside a judgment for fraud upon the court".

STATEMENT

Petitioner, John Hudson ("Hudson"), submitted his wrongful termination and defamation claims to arbitration under an agreement with his employer, Borg-Warner Protective Services Corporation and Burns International Security Services ("Borg-Warner," respectively). Hudson alleged that the decision by the American Arbitration Association ("AAA") was obtained by fraud, as a result of the arbitrator failing to take judicial actions on his issues for contempt or for breach of contract agreement for arbitration.

A. The Complaint of John Hudson

This case involves a "Pre-Dispute Resolution Agreement" made by the parties for arbitration. Under the provisions thereof,

provides, in relevant part, "despite any rule providing that any one party must bear the cost of filing and/or the arbitrator's fees, all costs of the American Arbitration Association and all fees imposed by any arbitrator hearing the dispute, will be shared equally between you and the company". Borg-Warner failed to pay its share of the filing fee. The "Pre-Dispute Resolution Agreement" further provides, that "each party agrees to pay costs and attorney's fees to the other party in the event of a breach of this agreement". Borg-Warner breached the contract agreement and forfeited its right to have arbitration. Respondent, the AAA failed to execute the "Pre-Dispute Resolution Agreement" for arbitration.

This case also involves a "subpoena duces tecum", that was signed by the arbitrator and served to Borg-Warner at Hudson request for the presentation of the "Bechtel Corporation Baton Rouge Cogeneration Project Technical Services Subcontract" in its entirety. On February 26, 2002, Borg-Warner failed to honor the "subpoena duces tecum" that was served on February 19, 2002.

These issues were before the arbitrator, that " Borg-Warner failed to honor the subpoena duces tecum" and had "breached the

contract agreement for arbitration". The arbitrator failed to take judicial actions on Hudson's issues for contempt or for breach of contract agreement for arbitration. The arbitrator ignored Hudson's issues which constitutes nonjudicial actions resulting in a decision obtained by **"fraud"**. As in *Hazel - Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 997.*

B. Proceedings Below

In this case, the arbitrator issued a written ruling on April 12, 2002, in favor of Respondent, Borg-Warner. On February 26, 2003, Hudson filed a petition for relief from judgment under Fed. R. Civ. P. 60(b)(3) against the AAA and Borg-Warner. The district court entered its judgment on January 9, 2004, dismissing Hudson's claims as untimely under 9 U.S.C. § 12 and that Hudson has failed to state a claim against the AAA under Fed. R. Civ. P. 12(b)(6). On January 21, 2004, Hudson appealed that decision and the court of appeals entered its judgment on June 17, 2004, affirming the district court's dismissal of Hudson's claims. On June 29, 2004, Hudson filed a petition for rehearing en banc. The court of appeals denied Hudson's petition and entered its denial on July 19, 2004.

REASONS FOR GRANTING THE PETITION

The district court decision (App., infra, 6a-13a) in this case conflicts with *Mireles v. Waco, 502 U.S. 9 (1991),* a prior decision of this Court. Since the lower court departure, there is a need to call for an exercise of this Court's power of supervision. This case is a timely and rare opportunity to provide that supervision to address the issue previously determined by this Court. Moreover, the decision below is erroneous, and the issue that it addresses is important.

I. The Decision of the Court of Appeals Conflicts With a Prior Decision of this Court.

In *Mireles v. Waco, 502 U.S. 9(1991),* the Court concluded that "judicial and arbitral immunity can be overcome only where the judge (or arbitrator) is engaged in nonjudicial actions or where the judge's (or arbitrator's) actions are taken in the absence of any jurisdiction." A judge (or arbitrator) is not immune from liability for **nonjudicial actions, i.e.,** actions not taken in judge's (or arbitrator's) judicial capacity.

In this case, the Arbitrator Kenneth E. Milam failed to take judicial actions on Hudson's issues for contempt or for breach of contract agreement for arbitration. If in fact, had the arbitrator taken judicial actions on Hudson's issues for contempt or for breach of contract agreement for arbitration, Hudson would have prevailed in arbitration. Since the arbitrator engaged in nonjudicial actions the AAA is not immune from liability, and is therefore liable unto Hudson for damages that are reasonable and or just.

II. The Court of Appeals Interpretation of Federal Rule of Civil Procedure 60(b)(3) Is Erroneous

Although Hudson is not attempting to relitigate the same cause of action adjudicated in the arbitration proceeding, his claims arise out the AAA's alleged fraudulent conduct during the arbitration. The court of appeals erred in over looking the facts and evidence presented in this case that show where the arbitrator engaged in nonjudicial actions.

In *United States v. Beggerly 524 U.S. 38, 1868*, the Court held that an "independent action" for relief from judgment is available only to prevent a grave miscarriage of justice.

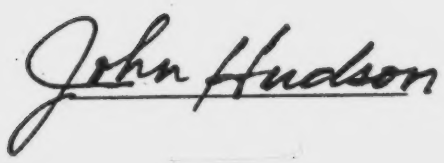
Federal Rule of Civil Procedure 60(b)(3) allows a party to move for relief from a judgment obtained by fraud. The petition for relief from judgment filed by Hudson is an "independent action" taken against the AAA and Borg-Warner for a decision obtained by fraud. Hudson had one (1) year from the date of the award to file a lawsuit.

III. The Question Presented Is Important

In *Mireles,* the Court addressed whether judicial immunity protected a state court judge from a civil action instituted by an attorney who alleged that the defendant judge ordered police officers to use "excessive force" to seize and compel him into court. In determining its decision, the Court concluded that "judicial and arbitral immunity can be overcome only where the judge (or arbitrator) is engaged in nonjudicial actions or where the judge's (or arbitrator's) actions are taken in the absence of any jurisdiction." The state court judge was granted judicial immunity for actions taken in judge's judicial capacity. A judge (or arbitrator) is not immune from liability for **nonjudicial actions, i. e.,** actions not taken in judge's (or arbitrator's) judicial capacity.

In this case, the arbitrator engaged in nonjudicial actions for actions not taken in arbitrator's judicial capacity. This case presents a rare opportunity for this Court to address the issue previously determined by the Court to secure and maintain uniformity of the Court's decisions. Therefore, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

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